> [T]he Tulalip assert an interest in defending *Washington II*[6] from collateral attack by way of an administrative hearing. This interest is immaterial because the district court explicitly ruled that the Samish may not use the reopened hearing to attack the *Boldt* decision.

Greene I, 996 F.2d at 977.

Samish also claims that due process was not denied because Tulalip was permitted to participate in the recognition proceedings as *amicus curiae*. *Samish Opposition Brief* at 16-17. However, as Samish surely knows, an *amicus curiae* is not a party to litigation. *Miller-Wohl Co., Inc. v. Comm'n of Labor and Industry*, 694 F.2d 203 (9th. Cir. 1982), *citing Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir.1953). *Amici* have

> been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion. *Moten v. Bricklayers, Masons and Plasterers Int'l Union of Am.*, 543 F.2d 224, 227 (D.C. Cir. 1976) (per curiam) (amicus may not appeal judgments); *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 300 So.2d 106, 111 (1974) (per curiam) (amicus is not a party and cannot assume the functions of a party nor control litigation); *Silverberg v. Industrial Comm'n*, 24 Wis. 2d 144, 128 N.W.2d 674, 680 (1964) (amicus brief seeking to challenge validity of testimony in the record stricken because attempt to challenge was not a proper function of amicus); 4 Am.Jur.2d, Am.Cur. §§ 3, 6 at 111, 114. *See City of Winter Haven v.* Gillespie, 84 F.2d 285 (5th Cir. 1936), *cert. denied*, 299 U.S. 606, 57 S.Ct. 232, 81 L. Ed. 447 (1936).

United States v. State of Michigan, 940 F.2d 143, 165 (6th Cir. 1991). An *amicus* cannot initiate, create, extend, or enlarge issues. *United States v. Alkaabi*, 223 F. Supp. 2d 583, 593 n.19

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6. *United States v. Washington*, 476 F. Supp. 1101 (W.D.Wash.1979), *aff'd*, 641 F.2d 1368 (9th Cir.1981), *cert. denied*, 454 U.S. 1143 (1982).

(D.N.J. 2002), *citing Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa.1995), and *Wyatt By and Through Rawlins v. Hanan*, 868 F. Supp. 1356, 1358-59 (M.D. Ala. 1994). Only a named party or an intervening real party in interest is entitled to litigate on the merits. *United States v. Michigan*, 940 F.2d at 165-66, *citing Miller-Wohl*, 694 F.2d at 204; *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); and *Gilbert v. Johnson*, 601 F.2d 761, 768 (5th Cir. 1979) (Rubin, J., concurring).

In short, participation as *amicus* was a wholly inadequate way for Tulalip to protect its rights, because Tulalip was not permitted to cross-examine or impeach Samish's witnesses, to offer its own impeaching and other evidence, or to raise new issues. Tulalip and the other Petitioning Tribes including Swinomish, who also tried to intervene in the Samish proceeding, have interests different from and adverse to Samish, in contrast to the BIA.[7] Had intervention been permitted, there may well have been a different outcome in the recognition proceeding. The only way for Tulalip and other tribes to obtain standing to litigate on the same basis as that exercised by the named parties was by intervention. *See United States v. Michigan*, 940 F.2d at 166 (only a named or intervening party is entitled to litigate on the merits).

Samish also claims that the Petitioning Tribes' due process claims significantly undermine federal "exclusive" or "plenary" authority over Indian affairs, because allowing the due process claim would result in re-opening the ***administrative recognition*** proceeding. But the only issue ***here*** is whether Samish is entitled to seek relief from the earlier judgments under Rule 60(b)(6) because of the alleged extraordinary circumstances attendant to its recent federal recognition. Samish cannot have it both ways: either the administrative recognition has no bearing on treaty tribe

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7. Another of the Petitioner Tribes, Swinomish, sought to intervene in the administrative proceedings on Samish recognition that resulted from the *Greene* case. The ALJ denied intervention based upon the *Greene* decisions. *See* 61 Fed. Reg. 15825-01, 15827 (1996).

status, as it argued and the Ninth Circuit ruled in the *Greene* cases, *supra*, or Tulalip and other Tribes were denied due process when they were prevented from intervening in the administrative recognition proceedings.

5. Samish created its own problem by choosing to litigate its treaty status before obtaining federal recognition.

In 1975, a number of other tribes, like Samish, had neither federal recognition nor treaty tribe status. The Stillaguamish and Upper Skagit Tribes chose the same path as Samish, *i.e.* to litigate treaty tribe status before achieving federal recognition, and were found to have Treaty fishing rights. *Washington I*, 384 F. Supp. at 378-79. Others, such as the Jamestown S'Klallam, elected to wait to litigate treaty tribe status until ***after*** they had achieved federal recognition. *See United States v. State of Washington*, 626 F. Supp. 1405, 1433 (Findings of Fact 326 & 327) (W.D. Wash. 1985). Samish elected to proceed without first obtaining federal recognition, and fully litigated its treaty tribe status in court. In so doing, Samish forfeited its right to relitigate the treaty tribe status at a later date. Nothing is more basic to the well-settled rules protecting the finality of judgments than the rule that a litigant gets only one bite at the judicial "apple".

6. Samish has not, and cannot, support its claim that the Tribes made "promises" to Samish to induce Samish not to pursue its treaty rights.

Samish claims that in previous proceedings," . . . the United States, the United States District Court, and those tribes opposing Samish treaty status all suggested that future federal recognition would probably warrant reexamination of the Samish Tribe's treaty fishing rights", and characterizes these alleged "suggestions" as "promises". *Samish Brief in Opposition* at page 5. There are at least two problems with this argument.

First, Samish does not, and cannot, point to a single instance in which the Tribes opposing treaty status suggested that future federal recognition would warrant re-examination of Samish's treaty rights. To the contrary, the Petitioning Tribes

have consistently taken the position that federal recognition would ***not*** justify reopening the issue.

Second, no one made any ***promises*** to Samish. Samish claims that the "most explicit" of the so-called "promises" occurred when the United States included the following statement in its Opposition to Samish's original Petition for Certiorari in the 1979 case:

> "[S]hould [the Samish] succeed in obtaining 'acknowledgement' of their current status as an 'Indian tribe []' in the pending administrative proceedings, this ***might*** justify an application to re-open the present judgment against them.

Samish Brief in Opposition at p. 5, note 8 (emphasis added). As the Court can see, it is a misnomer to call this statement a "promise". Certainly it is not the kind of affirmative statement required for promissory estoppel:

> The first essential element of promissory estoppel is that the promisor has made a binding offer in the form of a promise. . . . This promise must be definite and certain so that the promisor should reasonably foresee that it will induce reliance by the promisee or a third party. . . . A mere expression of future intention, however, does not constitute a sufficiently definite promise to justify reasonable reliance thereon.

Santoni v. Federal Deposit Ins. Corp., 677 F.2d 174, 179 (1st Cir. 1982).

7. Samish's Brief in Opposition includes unsupported factual statements and citations to evidence not in the record.

Federal Rule of Appellate Procedure 10 prohibits Samish form offering new "evidence" to the Court except by motion. Nevertheless, Samish violates this rule twice. First, Samish cites a tribal council resolution in support of its argument. *See Samish Opposition Brief* at 2, n.5. But that document is not in the administrative record. Second, Samish claims that "[t]he Department of Interior and the Department of Justice took three years to deny the Samish Tribe's request for recognition"

with no citation to the record below. *See id.* These references and averments should be stricken.

8. The Decision below destroys needed finality and repose for adjudicated cases.

In *Tahoe Sierra Preservation Council, Inc. v. Tahoe*, 322 F.3d 1064, 1077 (9th Cir.2003), the Ninth Circuit eloquently explained why finality and repose are central to our jurisprudence. Holding that final judgments should "rest in peace", the Court underscored the "merits of finality."

> The doctrine of *res judicata* provides that 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.' The application of this doctrine is 'central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.' Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated 'conserves judicial resources' and 'fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'

Id.

The Ninth Circuit's ruling in the case at bar is at total odds with these views. Here, the lower court's decision wastes judicial resources, increases the likelihood of inconsistent decisions, rejects well-established law interpreting Rule 60(b), and subjects the Petitioning Tribes to the threat of having to engage in costly re-litigation of an issue that was resolved and sustained on appeal many years ago. The expansion of this ill-conceived decision to other situations and cases has already begun.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted on behalf of the Petitioning Tribes this 20th day of December, 2005.

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